United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1054

To be argued by
T. BARRY KINGHAM

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1054

UNITED STATES OF AMERICA,

Appellee,

—v.—

LEON GREENBERG,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Leon Greenberg appeals from a judgment of conviction entered on January 21, 1976, in the United States District Court for the Southern District of New York, after a three-day trial before the Honorable Milton Pollack and a ju

Indictment 75 Cr. 1010, filed October 22, 1975,* charged Greenberg with conspiracy to commit mail fraud and four substantive mail fraud counts in violation of Title 18, United States Code, Sections 371 and 1341, respectively.

The trial began on November 5, 1975 and ended on November 11, 1975 when the jury returned a verdict of

* This indictment superseded Indictment 75 Cr. 532, filed June 3, 1975.

guilty on all counts. On January 21 1976 Greenberg was sentenced to two years' probation, a fine of $9,000 and to pay the costs of prosecution.

Execution of Greenberg's sentence has been stayed pending this appeal.

Statement of Facts

The Government's Case

A. Introduction.

The proof at trial showed that during 1970, Leon Greenberg, together with his co-conspirators Paul Grossinger and Bernard Roth, devised a scheme—facilitated by use of the United States mails—to defraud Greenberg's employer, the Sullivan County Harness Racing Association, Inc. ("Monticello Raceway"). The object of the scheme was to have the Raceway pay the bulk of the cost of a bar mitzvah and reception held for Greenberg's son at The Grossinger Hotel on November 7, 1970.

The scheme itself was quite simple. Greenberg, the Raceway's president, with the complicity of hotel owner Grossinger, through the services of Roth the hotel's comptroller, composed fictitious bills amounting to $4,856.16 for outings purportedly held at Grossinger's for horsemen—Raceway employees—on five specific Wednesdays during July and August 1970. The phony bills were submitted to the Raceway and paid in the normal course by mail in October, 1970. Then when the bar mitzvah took place in November, 1970 the money previously paid by the Raceway for the nonexistent outings was applied to the cost of the bar mitzvah. Greenberg ultimately paid only $987.09 for the bar mitzvah, the difference between the cost to the hotel, $5,843.25, and the amount

previously paid by the Raceway in response to the phony bills which were prepared, sent and paid at Greenberg's direction.

B. The scheme.

During the spring of 1970 Leon Greenberg and his wife began to plan for the bar mitzvah of their son Andrew, who was to come of age in November of that year. (Tr. 183). Greenberg, then president of Monticello Raceway, a harness racing track in the Catskill resort area in Sullivan County, New York, was a member of the board of directors of the Raceway, together with several hotel owners from that region. Among the directors was Paul Grossinger, president of The Grossinger Hotel, and an initial investor and founder of the Raceway. In 1970 Grossinger was also a vice president of the Raceway corporation. (Tr. 182).

When Grossinger learned that Leon Greenberg planned to have the bar mitzvah at the Concord, a rival hotel, Grossinger offered the services of his hotel at cost. (Tr. 199). Greenberg agreed, and sometime during late September or early October, 1970, Greenberg called Grossinger and said that he wanted the billing for the bar mitzvah handled in a certain manner, and that he had approval from the Raceway. (Tr. 184, 189). Grossinger, understanding that the Raceway was thus to pay a part of the cost, referred the defendant to the hotel's comptroller, Bernard Roth, to make the financial arrangements. (Tr. 184).

When Greenberg first spoke with Roth on the telephone, he mentioned nothing about the bar mitzvah. Rather, Greenberg said he was calling about bills for horsemen's outings which he claimed had occurred during July and August, 1970 and for which he alleged that

the Raceway owed money to the hotel. (Tr. 53). When Roth asked when the events had taken place, Greenberg replied "on Wednesdays" and then listed five dates: July 8 and 22, August 5, 16 and 26, 1970. He told Roth that horsemen, pressmen (reporters and publicity men) and Raceway officials had played golf and had lunch at The Grossinger on those days. (Tr. 53, 54). He also advised Roth how many persons had been present on each specific date, and asked Roth to figure the cost and call him back. (Tr. 54). Roth then calculated the cost of the outings at about $2,800, and returned Greenberg's call.

Roth reported the total to Greenberg, but the defendant informed him that the amount was not high enough and that the amount owing was closer to $5,000. When Greenberg asked Roth what other activities the golfers could have engaged in, Roth suggested dinner and cocktails. (Tr. 55, 56). Greenberg instructed Roth to calculate the cost of such meals and drinks for certain numbers of horsemen, but generally fewer than the number who had played golf and eaten lunch. (Tr. 56; GX 2A-2E). Greenberg then told Roth to figure the final total and report to him, which the comptroller did. That total, then about $6,200, met with Greenberg's approval, and he instructed Roth to send the bills to the Raceway, to Greenberg's attention. (Tr. 58).

Before Roth mailed out the bills he checked with Paul Grossinger, to insure that they comported with his wishes. (Tr. 58). Although Grossinger knew that no more than one outing had taken place in 1970, he approved the billing and insisted that the bills reflect the usual 25% courtesy discount given to the Raceway. (Tr. 58, 185). Roth reduced the bills accordingly, and then mailed to the Raceway to Greenberg's attention a bill for each purported outing, together with a summary of

the bills, dated September 30, 1970. (Tr. 58). The total of the bills was $4,856.16. (GX 2F, 2G).

On November 4, 1970, the hotel received a check from the Raceway dated October 29, 1970, in the amount of $4,856.16, in payment of the phony bills. (Tr. 60, 61). Because there was no record at The Grossinger that the outings had even taken place, Roth caused the cashier to prepare a ledger card to reflect receipt of the money. (Tr. 63).*

C. The bar mitzvah.

Andrew Greenberg's bar mitzvah took place on November 7, 1970 and was followed by a dinner and reception for 312 guests. (Tr. 68, 78).** Normally, prior to such an event billing instructions would have been given by the convention sales manager to the other hotel departments. (Tr. 69). However, because there were no instructions for this affair the bar manager initially rang up liquor prices at retail so that his staff would receive gratuities based upon the higher price. (Tr. 71, 156). The retail-price bar bills were then transferred to a ledger card set up by the cashier's office, which by the end of the day totalled $1,803.25. (Tr. 71; GX 8). No other charges were recorded at that time although a small slip was attached to the ledger card, noting that 312 meals had been served. (GX 8).

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* If the events had occurred and money were due the hotel, or even if the hotel had held the functions gratuitously, a ledger card would have been prepared in the normal course on the day of the event. (Tr. 67). Because no such card existed, and because Roth had to record receipt of the money from the Raceway, he had the card prepared on November 4, 1970 (GX 5).

** The cost figures for this event contradict Greenberg's modest claim that this was "only a luncheon with cocktails." (Brief at 8).

On Sunday, November 8, 1970, Leon Greenberg received $1,200 in cash from the hotel cashier. (GX 9; Tr. 73). The receipt, signed by the defendant and approved by the maitre d'hotel, David Geiver, reads, "bar mitzvah grat[uities]." (GX 9). That $1,200 in cash which was disbursed by the hotel to Greenberg was then posted to the ledger card, as was the cost of a guest room for Leon Greenberg's brother in the amount of $168.00. (Tr. 73). The total amount owed by Greenberg to the hotel as reflected by the ledger card, was $3,171.25.*

The initial retail price ledger card, together with the as yet uncalculated cost of 312 meals, however, was not to be the basis for the bar mitzvah bill. At Paul Grossinger's direction, Bernard Roth collected wholesale cost figures from the various hotel departments (Tr. 77, 78) and prepared a summary sheet. (GX 12). The total cost to The Grossinger, at wholesale prices, but figuring gratuities for the bar staff only at retail prices, was $5,843.25. (GX 12). Because Grossinger became ill in late 1970 and thereafter recuperated in Florida and in a Liberty, New York hospital, it was not until March 1971 that Roth was able to show Grossinger the bar mitzvah costs. (Tr. 79). Grossinger approved the figures and Roth mailed the bill for $5,843.25 to Greenberg at his law office in Monticello. (Tr. 80; GX 13).

D. The sc[illegible]e brought to fruition.

On A[illegible]pril 16, 1971, Greenberg wrote to Paul Grossinger on Raceway stationery, enclosing a copy of the bar mitzvah bill, and asked, "Would you please verify the correctness of this bill." (GX 15A). Thus reminded of the arrangement whereby Greenberg said the Raceway was

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* In March, 1971 additional gratuities in the amount of $75.00 came to light and were posted to the ledger card.

to pay a portion of Greenberg's bar mitzvah bill, Grossinger instructed Roth to reduce that bill by the amount earlier paid by the Raceway for the phony outings. (Tr. 85). Roth did what he was told, and sent Greenberg a bill for the difference: $987.09. That bill was paid by Greenberg's check, ostensibly as payment in full for the bar mitzvah, on July 11, 1971. (Tr. 87; GX 20).

E. The cover-up.

The Raceway's payment for the bar mitzvah remained a secret until April, 1974, when Paul Grossinger, on the advice of his attorney,* returned the $4,856.16 to the Raceway, resigned from his position as an officer and director, and billed Greenberg personally. (Tr. 192-196). The Raceway's comptroller, Robert Schoonmaker, testified that he was directed by Greenberg to place Grossinger's check for $4,856.16 (GX 26) in the safe, where it remained for thirteen months, until subpoenaed by a Federal Grand Jury. (Tr. 223-24).

F. The Government's proof concerning the fictitious outings.

Paula Bergman testified that she had been an employee of Grossinger's during the summer of 1970, and that her principal duty had been as golf club house secretary. In that capacity she was responsible for maintaining the records which showed who played golf and who had used golf carts. (Tr. 246). Miss Bergman had been employed at Grossinger's for a total of 12 years and was thoroughly familiar with the system of keeping records for golf functions. (Tr. 247).

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* At trial Greenberg tried to ascribe his indictment and prosecution to some supposed enmity harbored by this attorney, Lazarus Levine. (Tr. 38). Judge Pollack correctly refused to receive this irrelevant and collateral proof, Tr. 205, but Greenberg on appeal seems to treat it as established. (Brief at 38).

Normally golfers would be required to sign a receipt indicating they had paid or should be billed for use of the course and a golf cart, if any. She recalled that every summer employees of Monticello Raceway were entertained at the golf course and that they had eaten lunch and played golf. The sign-up system for the Raceway employees was generally the same as that for other golfers, with each man or group of men signing a golf slip. (Tr. 248). The slips were maintained in sequentially numbered packets in a machine at Miss Bergman's desk, and a green copy was retained by the hotel cashier. (Tr. 249-50).

A box of 2,700 such green slips was admitted into evidence, almost all of which had been prepared by Miss Bergman during July and August, 1970. (GX 30; Tr. 255, 256). These represented all of the slips for those months, with the exception of fifty slips which were unaccounted for.* Miss Bergman had reviewed all of the green copies in Government's Exhibit 30, and she found that there were no slips reflecting any Monticello Raceway golf outings for the dates July 8, 22 or August 5, 12 and 26, 1970, the days on which Greenberg claimed such outings had occurred. (Tr. 264-68).

Miss Bergman testified on cross-examination that a record was usually kept for each player, although a blanket slip covering all golfers at an outing could also be prepared. (Tr. 290). In any event, a record of some sort was always made, and there were no records of any outings during July and August, 1970, let alone on the five Wednesdays in question.

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* All slips for the five Wednesdays in issue were present in numerical sequence, with the exception of August 5, 1970, for which date only two slips were missing. (Tr. 266-269).

Robert Schoonmaker, comptroller of the Raceway, also testified on the subject of the outings that he had played golf at Grossinger's in 1970, but that he could not remember when he did so. (Tr. 239, 241). He identified a bill and copies of a golf slip from an outing on Wednesday, June 24, 1970 as a bill which probably had been received in the mail, and which had been paid by Raceway check. That bill had no information about lunch, cocktails or dinner; it referred only to a few golf carts and golf balls. (Tr. 236; GX 28, 29).

The Defendant's Case

A. The attempt to show that outings had occurred.

In a futile effort * to show that Raceway golf outings had indeed been held at Grossinger's on the dates in ques-

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* Greenberg's hyperbolic appellate attempt to persuade this Court that the outings had occurred simply cannot overcome the *evidence*, and indeed it did not fool the jury or the trial court. In light of Greenberg's inappropriate reliance before this Court on matters not in evidence (Brief at 2, 18), it is appropriate to call to the Court's attention Judge Pollack's view of the evidence on the existence *vel non* of the golf outings:

> "This case, which had every appearance at first as an internal misuse of funds, having no social or general significance, has assumed an entirely different aspect. The so-called evidence at the trial showing that Horsemen's Outings took place sufficient to warrant the statement in Greenberg's letter [to the trial court prior to sentencing] that these funds were properly spent was not the evidence at the trial at all. The physical exhibits flatly contradicted that story, and the credible explanations of the accomplices gave ample ventilation to the fraud on the Raceway.
>
> "Instead, there was a well orchestrated attempt to mislead the jury as to the truth and fact contradicted by overwhelming documentary and credible proof. The continued insistence that there was credible evidence at the

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tion, Greenberg called five faithful horsemen as witnesses. All recalled that they had played golf at Grossinger's during the summer of 1970, but none could recall any date, except to say that the outings were on Wednesdays. (Tr. 378, 387, 398, 402). The golf season, they said, extended from March through October, and they had played golf at many of the Catskill hotels during that period, not only Grossinger's. (Tr. 377-78).

The most telling testimony, however, was that of James Curran, a self-professed "golf nut" who played at *every* outing during 1970. He testified that he would stay for dinner only if he was not racing that night and required to be at the Raceway early. With respect to July 8, 1970, Curran's recollection was refreshed on cross-examination and he recalled that he had raced an early race that night and thus could not have been present for dinner on that evening if an outing had been held at Grossinger's. (Tr. 372-73). The bill prepared at Greenberg's direction for that date showed exactly the same number of guests having cocktails as had played golf. (Tr. 373; GX 2A). Because Curran could not have been at Grossinger's that day, the bill for the outing was plainly fictitious.

Some of the drivers testified that there had been "sign up sheets" at the Raceway where those interested in playing golf would record their names in the mornings. (Tr. 383, 415). However, James Curran testified that there were no such sheets and that he had never signed up that fashion. (Tr. 363). Loretta Kratz, a secretarial

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trial to support the payment is indicative of blind adherence to unreality. The least that defendant Greenberg could do under the circumstances, just as he did at the trial, was to remain silent and not compound misconduct with assertions of affirmative evidence which just did not exist in fact." (1/21/76, Tr. 40-41).

employee at the Raceway, testified that the sheets were maintained in the publicity office. (Tr. 435). Eileen McCullough, Greenberg's secretary, testified for the defense that once Greenberg had asked her for the sheets, but she was unable to state when it was that this had happened. (Tr. 323).*

Greenberg also called Peter Donnelly, former golf professional at Grossinger's, who testified that there had been about six horsemen's golf outings at Grossinger's during the summer of 1970, but he could not recall any of the dates. (Tr. 345, 359-60). He stated that a record of some type was always kept, and identified a "blanket slip" from 1973 as an example. He agreed with Paula Bergman that a slip would be prepared, either individually or on a blanket basis, and that a record of some type would always be made. (Tr. 350-53). Donnelly also revealed that he had spoken with Paul Grossinger prior to the trial and Grossinger had said that he had recalled golf outings in general (no specifics were elicited) and told Donnelly only to tell the truth. (Tr. 358).

B. Payment of the phony bills.

Edna Coyle, a Raceway bookkeeper, testified that she had prepared the check for $4,856.16 which was sent to Grossinger's at Greenberg's direction. (Tr. 441). She claimed that it was prepared on October 29, 1970 but held for the Executive Committee meeting on November

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* Again Greenberg misstates the evidence, claiming that when Roth spoke with Greenberg about the outings Greenberg had asked Mrs. McCullough for the sign-up sheets and had obtained them from the publicity office. (Brief at 15). Mrs. McCullough did *not* testify that he had asked for the sheets during a conversation with Roth, nor that Greenberg had obtained the sheets from the publicity office. (Tr. 323-24). Although counsel, by leading questions, asked if this had occurred in September, 1970, Mrs. McCullough was unable to so testify (Tr. 323).

2, 1970. However, the minutes of that meeting reveal that Mr. Greenberg announced that the bills "for all events" at Grossinger's "*had* been paid in full." (DX W; Tr. 530) (emphasis added). There was no mention in the minutes that the check *per se* was signed or even discussed at that meeting.

C. The bar mitzvah.

Hyman Hoffer, assistant maitre d'hotel at Grossinger's, testified that he had been at the bar mitzvah and that Greenberg had asked him how much to tip the staff. He referred the defendant to Dave Geiver, the employee in charge of the affair, and witnessed Geiver receive some money from Greenberg. (Tr. 462, 463). However, Hoffer was not present when Greenberg received the $1,200 in gratuities the next day as shown by the cashier's receipt which the defendant had signed. (GX 9). Greenberg's receipt of that money went undisputed by any evidence, and Greenberg produced no evidence of the agreement between himself and Paul Grossinger, which his counsel claimed was that Grossinger would pay for the food and Greenberg would pay for everything else.

D. Character evidence.

Greenberg produced the testimony of seven witnesses, who testified about his reputation in the community.*

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* Greenberg also refers to the fact prior to sentencing 222 persons wrote letters attesting to his character. (Brief at 4). In this regard, Judge Pollack noted:

> "Many testimonials have been received by the Court in extravagant prose, vouching for Greenberg's fine qualities, initiative, inventiveness, dedication to business, support of communal, religious and charitable causes. No specific illustration accompanied any of these conclusory state-

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Predictably, none knew anything about the facts of the case, and several suffered from interesting testimonial infirmities. For example, Sheriff Wasser could not recall whether, as a member of a town board, he had voted to use taxpayer money to pave the streets of a private development in which Greenberg was interested. (Tr. 412-414). Father Isaacson admitted having received sizeable contributions from the Raceway after testifying as a character witness at a trial on behalf of Raceway shareholder Ben Slutsky (Tr. 477), and Monticello Mayor Ann Kaplan, a member of every Democratic Committee in Sullivan County, incredibly did not know the source of the funds for those committees, nor whether the Raceway had contributed. (Tr. 432, 433).

The defendant did not testify.

ARGUMENT

POINT I

The evidence was more than sufficient to sustain Greenberg's conviction for conspiracy and mail fraud.

Considering the evidence in the light most favorable to the Government, *e.g.*, *United States* v. *Merolla*, 523 F.2d 51 (2d Cir. 1975), and indeed by any other rational standard, the proof at trial was more than sufficient to support the jury's verdict. Greenberg's claims to the contrary are entirely without merit.

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ments. No identification was given for the source of the benefactions. His tax returns leave open the question of whose money, in addition to the relatively small percentage of his own reported income and deductions, was used to accomplish such a broad scale of indicated communal, charitable and philanthropic gifts. Certainly if the give-aways were other people's money they would carry lesser significance." (1/21/76, Tr. 36, 37).

A. Conspiracy.

Greenberg was charged with conspiring with Paul Grossinger and Bernard Roth to violate the mail fraud statute, and that is precisely what the evidence showed he did.

In the fall of 1970, Greenberg and Grossinger agreed that Monticello Raceway would pay a part of Greenberg's bill for his son's upcoming bar mitzvah. Greenberg told Grossinger that he had approval from the Raceway to do that, but he produced no evidence of such approval at trial, or indeed for approval to incur bills for horsemen's outings.* Having thus obtained Grossinger's agreement to bill the Raceway in general for part of the bar mitzvah, Greenberg then told him he wanted the billing handled in a certain fashion. That fashion, of course, was to tell Roth that certain outings had taken place when they had not and to instruct Roth to prepare bills for those fictitious outings. When Roth checked with Grossinger to determine whether he was acting in accordance with his employer's wishes, Grossinger approved the bills which were to be sent, but insured their legitimate *appearance* by adding the usual 25% courtesy discount accorded the Raceway. Grossinger thought there might have been one outing during the summer of 1970, but the others were "unknown" to him.

After Roth had the bills mailed to the Raceway, a check was forwarded by mail from the Raceway to

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* Greenberg's assertion that the term "approval" referred to approved payment for outings is vacuous. (Brief at 20, n.*). There was no evidence that in speaking with Grossinger, Greenberg meant that the Executive Committee had approved payment for outings, and Greenberg offered no such proof, because the Executive Committee minutes reflect nothing of the sort.

Grossinger's in payment of the bills, and Roth had an accounting entry made to reflect receipt of the money. Later, after the bar mitzvah, Grossinger told Roth to send the wholesale cost bill to Greenberg, but neglected to tell him to reduce it by the amount of money already paid by the Raceway, $4,856.16. When Greenberg wrote in April to remind him ("please verify the correctness of this bill"), Grossinger filled Roth in on the scheme and told him to make the appropriate entries on the books and bill Greenberg only for the balance, $987.09. Roth did so, thus becoming part of the conspiracy.

When Greenberg mailed his check in July, 1971 the unlawful scheme had reached fruition. He had succeeded in obtaining the Raceway's money by fraud, with the aid of a knowing Grossinger and a less knowing Roth, and by his final check he had closed out the bar mitzvah bill, thus making it appear as if *he* had paid in full.

Greenberg claims that the evidence fails because both Roth and Grossinger denied any intentional wrongdoing. However, both men testified to facts which implicated them as co-conspirators, and it was absolutely clear that Greenberg and Grossinger knew that the "outings" bills were fraudulent and that the Raceway had paid them in reliance on the fraudulent representations contained in them. The two obviously combined and acted together to violate the mail fraud statute, regardless of Grossinger's self-serving claim at trial that he thought he had done nothing wrong.* The proven facts spoke for themselves, and it was established beyond doubt that both Greenberg and Grossinger knew that the "certain fashion" of billing for the bar mitzvah was to have the Raceway "front" a good portion of the cost based upon the false

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* The jury, of course, would have been entitled to reject this aspect of Grossinger's testimony.

bills.* Their combined activity here was certainly an agreement to perform acts in violation of the mail fraud statutes.

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* The cases which Greenberg cites to support his position, while indeed a "wave" (Brief at 26), serve more to sweep aside his tenuous arguments than to undercut his conviction. In *United States* v. *Vasquez*, 319 F.2d 381 (3d Cir. 1963), the alleged co-conspirator in a fraudulent marriage scheme was not a party to the conspirational conduct. The marriage arrangements were made between the defendant and a third party. The co-conspirator did not agree to any of the fraudulent aspects of the scheme. Accordingly, the court reversed the convictions. In the instant case however, the testimony established that Greenberg, Grossinger and Roth agreed to bill the Raceway for the bar mitzvah through the use of phony bills for horseman's outings. Knowledge that illegal conduct is conspiratorial is not an essential element of the crime. The other cases cited by the defendant are equally inapposite: *United States* v. *Merolla*, 523 F.2d 51 (2d Cir. 1975) (conviction for conspiracy to violate the Hobbs Act reversed where no showing that the appellant's conduct affected interstate commerce); *United States* v. *Freeman*, 498 F.2d 569 (2d Cir. 1974) (evidence insufficient to sustain conviction for conspiracy to import cocaine where co-conspirator merely assisted one who *had been* a member of a conspiracy by warning him after the scheme failed); *United States* v. *Terrell*, 474 F.2d 872 (2d Cir. 1973) (evidence that co-conspirator drove automobile during narcotics transaction was sufficient to establish participation in the conspiracy); *United States* v. *Infanti*, 474 F.2d 522 (2d Cir. 1973) (mere presence in a room with stolen securities is not sufficient to establish actual or constructive possession of the securities): *United States* v. *Docherty*, 468 F.2d 989 (2d Cir. 1972), (bank employee's entry of a loan as his own liability was not false so as to constitute a conspiracy to violate 18 U.S.C. § 656 or § 1005); *United States* v. *Fantuzzi*, 468 F.2d 683 (2d Cir. 1972) (proof of association with conspirators without more is insufficient to establish a foundation for the admissibility of incriminating statements of co-conspirators); *United States* v. *Hysohion*, 448 F.2d 343 (2d Cir. 1971) (the fact that the defendant told a willing buyer of narcotics how to contact a seller did not imply that there was an agreement between the seller and the defendant); *United States* v. *Steward*, 451 F.2d 1203 (2d Cir. 1971) (conspiracy conviction reversed where evidence did not establish that defendant exer-

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Greenberg attempts to refute the force of the evidence of conspiracy with his assertion that he proved evidence of conspiracy with his assertion that he proved at trial that the bills were not false, because the outings in fact were shown to have taken place. However, even his own witnesses, Peter Donnelly and James Curran, put that contention to rest. Curran, of course, established that there could not have been an outing on July 8, 1970, as Greenberg had claimed, because Curran played golf at every outing and could not have been at Grossinger's for dinner that night due to his racing schedule. That "outing" was the one at which Greenberg told Roth that all golfers had eaten dinner. Peter Donnelly, the golf professional, testified that a record was kept of every outing, and the records to his knowledge were kept in numbered sequence on the type of slip that Paula Bergman had identified. Indeed, as an example of a group or "blanket" slip, Donnelly identified an outing slip from 1973. He confirmed the fact, however, that every time an outing occurred, a record of that type would be made. Yet Paula Bergman, who had prepared and reviewed virtually all of the golf slips for that summer, found no slips, blanket or otherwise, for any Monticello Raceway outing on any of the days in question. Indeed, for all but one of the days, every single golf slip was available for her review, in numbered sequence—and there simply were no slips for horsemen's outings, because there had been no outings on those dates.

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cised any dominion or control over illegal drugs); *United States* v. *Cantone*, 426 F.2d 902 (2d Cir. 1970) (testimony that the defendant was seen with an alleged co-conspirator at the race track was insufficient to establish a conspiracy to prepare false 1099 form which concealed real name of racetrack betting winner); *United States* v. *Cianchetti*, 315 F.2d 584 (3d Cir. 1963) (conviction reversed where there was no evidence of an agreement to cooperate in a heroin smuggling venture); *United States* v. *Crosby*, 294 F.2d 928 (2d Cir. 1961) (evidence insufficient as to guilty knowledge in prosecution for failure to comply with Securities Act where defendant relied on opinion letters of an attorney and conducted business according to accepted standards).

Not one of the horsemen would say that he had been at an outing at Grossinger's on any of the days in question, and all agreed that they had played golf at other hotels as well in a season which extended from March through October. Moreover, the Government produced evidence of an outing which *had* occurred in June, and for which the Raceway had been billed by Grossinger's. Greenberg's assertion that the other outings had actually occurred has no support in the record, and the jury quite obviously rejected the contention.

B. Mail fraud.

In addition to arguing that the facts established at trial were insufficient to sustain his conviction, Greenberg also appears to suggest that his conduct was not encompassed within the mail fraud statute, 18 U.S.C. § 1341. This argument is frivolous.

First, as noted above, the evidence of the conspiracy and the scheme to defraud was identical. In furtherance of the scheme, Greenberg used or caused the mails to be used on four occasions: September 30, 1970, the date of mailing of the phony bills from Grossinger's to the Raceway (Count Two); October 29, 1970, the date of mailing of the Raceway's check in payment of the phony bills (Count Three); April 6, 1971, the date of mailing of Greenberg's cryptic letter requesting "verification" of the bar mitzvah bill, actually a reminder to Grossinger to follow the plan (Count Four); and July 12, 1971, the date of Greenberg's mailing of a personal check in payment of the reduced bill, ostensibly in full payment of the bar mitzvah (Count Five). Given the scheme to defraud, described earlier, all of the mailings were properly charged and proved to be in furtherance of it.

The defendant's reliance on *United States* v. *Maze*, 414 U.S. 395 (1974); *Pereira* v. *United States*, 347

U.S. 1 (1954), and *Kahn* v. *United States*, 323 U.S. 88 (1944) is entirely misplaced. First, the mailings of the phony bills and the Raceway check, charged in Counts One and Two, were essential to the success of Greenberg's scheme. Second, the transactions outlined in Counts Four and Five were clearly intended to "lull the victims of the fraud into a false sense of security and thereby make the apprehension of the defendant less likely than if no mailings had taken place." *United States* v. *Maze*, *supra*, 414 U.S. at 403. Greenberg's letter of April 16, 1971, and the subsequent forwarding of the check on July 12, 1971, "legitimized the fraud and provided it with the appearance of normality." *United States* v. *Marando*, 504 F.2d 126 (2d Cir.), *cert. denied*, 419 U.S. 1000 (1974); see also *United States* v. *Cohen*, 518 F.2d 727 (2d Cir. 1975).

In *Marando*, this Court analyzed the Supreme Court's decision in *Maze* in a factual context closely analogous to that of the instant case. There the mailings consisted of broker confirmation slips sent to confirm sale transaction which effected a manipulation of stock prices. The Court reasoned that the receipt of the confirmation slip lent the scheme an appearance of normality. The Court stated:

> "much like the mailing in *Goldberg*, 401 F.2d 644 (2d Cir. 1968), *cert. denied*, 393 U.S. 1099 (1967), failure to send the confirmation slips would surely arouse a customer's suspicion and invite unwanted inquiry." *United States* v. *Marando*, *supra*, 504 F.2d at 130.

Applying *Marando* to the facts of the case, it is clear that the mailings designated in Counts Four and Five

were in furtherance of the scheme to defraud.* Greenberg structured the transactions so that they would appear to be completely normal. He had Roth prepare and mail bills, he sent letters, and he had the Raceway send a check. Such activities, while not criminal in themselves, certainly were essential to Greenberg's criminal object—successful completion of the scheme to defraud and an effective coverup.**

POINT II

The trial court's instructions to the jury were correct.

Greenberg launches a roadside attack on the District Judge's charge to the jury. None of the claims has merit.

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* This is clearly not a case where the Government is "over extending a criminal statute" as alleged by defendant. Compare *Rewis* v. *United States*, 401 U.S. 808 (1971) (conducting a gambling operation frequented by out-of-state bettors does not without more, constitute a violation of the Travel Act, 18 U.S.C. § 1952); *United States* v. *Bass*, 404 U.S. 336 (1971) (receipt of a firearm by a convicted felon does not violate 18 U.S.C. § 1202(a) unless possession and transportation in interstate commerce is also shown). Nor is this case where the government "contrived a federal crime." Compare, *United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973).

** Greenberg asserts that "[t]he transaction was fully completed upon the Executive Committee's authorization of payment and the later mailing served no purpose in that regard." (Brief at 31). However, there was absolutely no evidence that the Executive Committee had authorized anything. Rather, the minutes reflect only that *Greenberg* discussed the Grossinger bill "for all events" and stated that it *had* been paid in full. This representation of a false *fait accompli* was hardly a committee authorization as the defendant would have this Court believe.

A. Judge Pollack properly rejected the defendant's proffered instruction on the "theory" of his defense.

After instructing the jury on the elements of the crime of mail fraud, Judge Pollack stated:

> "Under the Mail Fraud Statute, false representations, promises or pretenses do not amount to a fraud unless they are made with fraudulent intent. However misleading or deceptive a plan may be, the use of the mails to execute it or attempt to do so does not constitute a crime if the plan was devised in good faith and not with a specific intent to deceive or defraud.
>
> Honesty and good faith on the part of the defendant is always a good defense to the charges in these counts. An honest belief in the truth of representations made by him is a good defense however inaccurate the statements may turn out to be.
>
> Here the statements in question are the bills prepared in September for purported horsemen's golf outings on five specific Wednesdays in July and August 1970 said to have taken place." (Tr. 647).

Later, in outlining the parties' contentions the District Judge said:

> "The defendant denies that there was any fraud or coverup, and defendant denies conspiracy and denies that the bar mitzvah had anything to do with the payment of these raceway monies to the Grossinger and contends that the money paid by the track in 1970 was due the Grossinger for five horsemen's outings mentioned previously.

> Defendant contends that in connection with issuing the check of the raceway for the $4,856.16 he had reported to the executive committee of the raceway on November 2, 1970, the receipted bills from the Grossinger, the 25 percent deduction allowed and the payment of the bills and that this is mentioned in the committee's minutes.
>
> In summary, the defendant questions the credibility and motivations of the government's witnesses and denies any connection with or complicity in any attempt to defraud Monticello Raceway in any transactions or schemes in connection with the use of its funds.
>
> The defendant relies on the presumption of his innocence and claims that in all events guilt has not been established beyond a reasonable doubt as to him." (Tr. 668-69).

The trial court also correctly instructed the jury that in order to establish guilt of mail fraud the Government had to prove beyond a reasonable doubt that the defendant had engaged in a scheme to defraud the Raceway and that he had used the mails in furtherance of that scheme, with a specific intent to defraud (Tr. 647).

Greenberg's theory of defense, argued by counsel in summation, was that the defendant had never intended that Raceway funds be used to pay for the bar mitzvah, and that the bills which Greenberg had told Roth to prepare were not fraudulent because the outings had taken place and because Greenberg believed that money was due to Grossinger's from the raceway for that purpose. That is precisely what Judge Pollack instructed the jury.

Surprisingly, the defendant makes only a single passing reference (Brief at 35) to these portions of the

Judge's charge, while claiming that the trial court's refusal to charge in the precise language requested by counsel amounted to a failure to instruct Greenberg's defense. The defense had requested the following charge:

> "The prosecution is obliged to convince you beyond a reasonable doubt that no services were rendered by Grossinger's for any horsemen who used their facilities. If you should have a reasonable doubt in your mind that horsemen did, in fact, use their facilities and Leon Greenburg [sic] believed that funds were due and owing to Grossinger's, then you cannot find him guilty of conspiracy or the substantive offense of mail fraud." (Defendant's requested instructions No. 13.)*

Judge Pollack properly refused to deliver this charge, because the instruction was an incorrect statement of the law and of the evidence. As Judge Friendly recently noted in *United States* v. *Leonard*, 524 F.2d 1076, 1084 (2d Cir. 1975), "although lawyers seem never to learn the lesson, it is elementary that to put a trial court in error for declining to grant a requested charge the proffered instruction must be accurate in every respect." Such was decidedly *not* the case here.

Greenberg's requested instruction was incorrect because—as a matter of law—the Government was *not* required to establish beyond a reasonable doubt "that no services were rendered by Grossinger's for any horsemen who used their facility." The Government was re-

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* After hearing the proposed charge which was later actually given, defense counsel expressed no objection on this point, except to request that the instruction be given in his language. (Tr. 524). Counsel did not suggest—as he does now—that the trial court had misstated the defense theory. This, we submit, amounted to a waiver of any objection. *United States* v. *Dixon*, Dkt. No. 75-1317, Slip op. 2615, 2630-31 (2d Cir., March 12, 1976).

quired to prove *only* that the defendant was part of a scheme to defraud the Raceway and that he intended to do so. See *United States* v. *Regent Office Supply Co.*, 421 F.2d 1176, 1180 (2d Cir. 1970). Moreover, since the Government had offered proof that there had indeed been an outing in June 1970, which was unrelated to those for which the phony bills had been prepared, the requested charge was extremely misleading, stating as it did that the use by "any horsemen" of Grossinger's facilities would be enough to support an acquittal.

Thus, the requested instruction is supported neither by the law nor the evidence.* So much of the defendant's theory as *was* supported by the law and evidence was submitted to the jury on proper instructions, quoted above, and the defendant's inaccurate and misleading requested instruction was properly denied by Judge Pollack.

B. The accomplice-witness instruction was correct.

Greenberg claims that he was prejudiced by the trial court's accomplice-witness instruction. He also finds fault because the indictment, read during the charge to the jury, named Roth and Grossinger as co-conspirators.

Concerning Roth and Grossinger's testimony, the Court instructed:

> "Two Government witnesses, Paul Grossinger and Bernard Roth, admittedly participated in acts charged in the indictment as crimes. Thus they

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* The defendant's reliance on *United States* v. *Singleton*, Dkt. No. 75-1114, Slip op. 1873, (2d Cir. February 13, 1976); *United States* v. *DeMarco*, 488 F.2d 828 (2d Cir. 1973); *United States* v. *Terrell*, 474 F.2d 872 (2d Cir. 1973), and similar cases, is entirely misplaced. Those cases involved a failure to instruct on a required element of proof. Here, the court gave complete and proper instructions on each element.

> are considered accomplices. The Government frequently must use testimony of accomplices because otherwise it would be difficult or impossible to detect or prosecute wrongdoers.
>
> The testimony of an accomplice is not to be rejected unless the jury thinks it has no weight. The testimony of one who provides evidence against a defendant on trial must be received by the jury with caution and weighed with care.
>
> The fact that these witnesses may have motives for testifying falsely does not necessarily show they were testifying falsely. The unsupported testimony of an accomplice, if credited by the jury, is sufficient on which to convict the defendant on trial when the Government has sustained its burden of proof." (Tr. 640-41).

Counsel excepted to this instruction on the ground that he did not believe anyone had been established as an accomplice because Roth and Grossinger had "denied . . . any wrongdoing." (Tr. 674). Judge Pollack properly replied:

> "The Court: I thought that I was doing you a favor by giving you an accomplice charge, and they clearly are charged here as accomplices because the indictment charges them as co-conspirators, and I put them in their proper frame as not just ordinary witnesses, and made the rule as to them and their testimony of careful scrutiny and the other phrase of caution that goes at that point." (Tr. 675).

Counsel then objected to reading the phrase "unindicted co-conspirator" to the jury as part of the indictment.

(Tr. 675). The Court properly refused to alter its instructions.*

Bernard Roth and Paul Grossinger *were* "accomplices" because they were themselves subject—save their immunity—to indictment as principals or accessories to the offenses charged. See *United States* v. *Simmons*, 503 F.2d 831, 837 (5th Cir. 1974). Grossinger knew that the "outings" bills he had directed Roth to send to Greenberg were phony, and the facts make clear that when Roth realized the nature of the scheme, he nonetheless followed Grossinger's directions and applied the Raceway's money to the bar mitzvah bill. The facts show that Grossinger and Roth could have been charged, and certainly that probable cause existed to believe that they had committed the crimes charged in the indictment. Indeed, this is apparent from the documentary evidence alone. Their denials of criminal intent, elicited by defense counsel on cross-examination, were a matter for the jury to weigh in assessing the witnesses' credibility and the defendant's guilt. Those denials hardly remove them from the legal status as accomplices. Both Roth and Grossinger *had* admittedly participated in the acts charge as crimes in the indictment as Judge Pollack instructed. (Tr. 640). Moreover, the form of the charge favored the defendant because it properly advised the jury to receive the testimony "with caution and weigh [it] with care." This was the proper charge under the circumstances. *United States* v. *Ploof*, 464 F.2d 116, 119 (2d Cir. 1972), and cases cited therein.**

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* Counsel's claim of surprise at the accomplice-witness instruction is absurd. (Brief at 36). The Government had requested the very instruction which was given, and counsel was furnished with a copy of the Government's requests.

** Indeed, it is the better practice to give the instruction even when it is not requested. *United States* v. *Abrams*, 427 F.2d 86 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970).

Greenberg's claim of error in the trial court's reference to Grossinger and Roth as "unindicted co-conspirators" is likewise groundless. The evidence cited above clearly showed that they were properly so named in the indictment. Greenberg's flamboyant reliance on *United States* v. *Briggs*, 514 F.2d 794 (5th Cir. 1975) is misplaced. There, the unindicted co-conspirators had sued to have their names expunged from the indictment following acquittal of the defendant-conspirators and the Fifth Circuit agreed with the claim that their good names, reputations, and ability to obtain employment had been impaired. *Id.* at 797-99.* The Court ordered the names expunged but made no reference to any effect on the charged defendants by the naming of unindicted co-conspirators.

Here, Greenberg would have this Court expand the *Briggs* rationale to permit a named defendant to object to the inclusion of unindicted co-conspirators in the indictment. He thereby seeks to extend the logic of *Briggs* well beyond its limits. The beneficiary of the ameliorative rule in *Briggs* is the unindicted co-conspirator who seeks expungement. Here there was no such effort by Grossinger and Roth. In fact, defense counsel admitted to the Court below that he had approached their counsel to suggest such action, but they declined to take it. (Defendant's Appendix at 71a, 72a). Thus, even assuming the validity of *Briggs* in this Circuit—an issue the Court need not reach in this case and which we do not concede—Greenberg has no standing to make that argument and *Briggs* confers none.

There can be no question that Bernard Roth and Paul Grossinger *were* co-conspirators on the evidence here and

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* None of the unindicted co-conspirators in *Briggs*, as in the instant case, had been immunized in order to secure their testimony.

that Grand Jury acted within its power by naming them as unindicted co-conspirators.* Judge Pollack, not faced with any objection from Grossinger or Roth, properly read the indictment to the jury, including their designation as unindicted co-conspirators.

The overwhelming evidence of conspiracy and joint action here speaks for itself. Judge Pollack's instructions in that regard were proper, and did not prejudice the defendant's right to a fair trial.

C. The trial court's instructions on reasonable doubt were correct.

Again, by selective excision of a portion of Judge Pollack's instructions, Greenberg claims reversible error. He finds prejudice in the trial court's definition of "reasonable doubt" as

> "one that rises out of the evidence in the case or the lac of evidence. It is a doubt which is substantial and not merely shadowy." (Tr. 635).**

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* Indeed, it is difficult to see what alternative the Grand Jurors had. Both Grossinger and Roth had been granted immunity by State authorities and testified before the Federal Grand Jury after that immunity had been conferred. Since the Grand Jurors were made aware of the immunized status of these two men, it would hardly have been proper for them to indict men they knew could not be prosecuted. To simply characterize Greenberg's co-conspirators as "known," without naming them—another possible alternative, would not have fully presented the picture of the crime as the Grand Jurors understood it.

** Judge Pollack continued the definition as follows:

"A reasonable doubt is one that appeals to your reason, to your judgment, to your common sense and to your experience. It is not an excuse to avoid performance of an unpleasant duty. A reasonable doubt is such as would

[Footnote continued on following page]

Specifically, Greenberg complains about the use of the term "substantial."

In *United States* v. *Heap*, 345 F.2d 170, 171 (2d Cir. 1967), this Court recognized the propriety of the instructions given in this case, and approved a charge that a "reasonable doubt" was a "doubt which must be substantial and not speculative. . . ." In so doing, the Court cited *Holland* v. *United States*, 348 U.S. 121, 140 (1954), where the Supreme Court approved a reasonable doubt instruction which had included the definition, "substantial doubt, not a trivial doubt." *Holland* v. *United States*, 209 F.2d 516, 522 (10th Cir. 1954). *Holland* and *Heap* were most recently followed by this Court in *United States* v. *Aiken*, 373 F.2d 294 (2d Cir.), *cert. denied*, 389 U.S. 833 (1967),* which the defendant incorrectly claims to be the only such decision of this Court. (Brief at 42).

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cause prudent people to hesitate before acting in matters of importance to themselves.

Putting that a little differently, if you are confronted, as indeed you are here, with an important decision, and after reviewing all the factors that are pertinent to that decision you find yourself beset by uncertainty and unsure of your judgment, then you have a reasonable doubt. Conversely, in that same situation, if you have taken into account all the elements that pertain to the problem, and you find that you have no uncertainty, and no reservations about your judgment, then you have no reasonable doubt.

Proof beyond a reasonable doubt does not mean proof to a positive certainty or proof beyond all possible doubt. If that were the rule, few persons, however guilty, could ever be convicted. It is practically impossible for a person to be absolutely and completely convinced of any fact which by its nature is not susceptible of mathematical certainty. So that kind of certainty, as I have tried to indicate, is not the test. You are going to have to rely upon your own common sense and general experience in evaluating the evidence." (Tr. 635-36).

* But see *United States* v. *Bridges*, 499 F.2d 179 (7th Cir. 1974); *United States* v. *Atkins*, 487 F.2d 257 (8th Cir. 1973).

Greenberg requests the overruling of *Aiken* on the basis of *In re Winship*, 397 U.S. 358 (1970), a case which has nothing to do with this issue. In *Winship*, the Supreme Court determined the "single, narrow question" whether proof beyond a reasonable doubt is the required standard of proof in juvenile delinquency adjudications. *Id.* at 359. The Court did not undertake to define reasonable doubt in any fashion nor did it rule on the propriety of any particular instruction. The Court simply contrasted the reasonable doubt standard with the "preponderance of evidence" test and concluded that the Due Process Clause required that juvenile delinquency be established by the former. *Id.* at 368. Greenberg somehow translates that holding into a generator of "centrifugal force" by which the term "substantial" in a reasonable doubt instruction "should be forever cleansed from the reasonable doubt edict." (Brief at 47). *Winship*—despite Greenberg's tortured prose—accomplishes no such thing.

Greenberg fails to recognize that the clear import of the word "substantial," juxtaposed as it was here clear with the term "shadowy", conveyed to the jury nothing more than the thought that a trivial or speculative doubt would not be a sufficient reason for acquitting the defendant.

Finally, even if the term "substantial" were found offensive standing alone, *see United States* v. *Christy*, 444 F.2d 448, 450 (6th Cir. 1971), the *overall* instruction given here properly submitted to the jury the concept of reasonable doubt. *Holland* v. *United States*, *supra*, 348 U.S. at 140.

D. The Court's supplemental instruction on the question of immunity was entirely proper.

During its deliberations, the jury sent in the following note:

> "It is felt that if all three men were on trial as defendants, all men might be considered guilty, but since two men are getting off free the third should also be acquitted. Can you address yourself to the question of immunity?" (Tr. 693).

Following a lengthy colloquy with counsel, Judge Pollack read to the jury each of the references which had been made at trial to Roth's and Grossinger's immunity, from both opening statements and the testimony of the witnesses. (Tr. 717-19). The Court then instructed that guilt was personal and that the jury was required to render a verdict on the evidence in *this* trial. (Tr. 719-20). Included in that instruction was the following:

> "The only case before this jury at this time is the case of Leon Greenberg. Punishment of others, if there is to be any, the trial of others, if there is to be one, punishment of Greenberg, if the Court is required to impose any, must not on your oath interfere with or divert you from rendering a verdict in accordance with the evidence in this case as you swore, so help you God.
>
> * * * * *
>
> Now, Bernard Roth and Paul Grossinger have been promised by New York State that they will not be prosecuted by New York State and they were promised that they would not be prosecuted by the United States Attorney on the matters which New York State turned over to the United States Attorney.
>
> It makes no difference what Mr. Roth and Mr. Grossinger believe as to the extent of their state

> grant of immunity in this case. You may consider that they have been promised not to be prosecuted by the Federal authorities in this matter, and you may also be guided by the fact that the question in this case is not what affects them, but you must find in this case a true verdict on the evidence in this case in accordance with that evidence regardless of any other consideration." (Tr. 710-21).

The defendant now argues, as he did below (Tr. 723), that these instructions somehow suggested that Roth and Grossinger could or would later be prosecuted. However, pursuant to the defendant's express request (Tr. 699, 707, Court's Exhibit 10),* Judge Pollack instructed the jury that the witnesses had been promised *both* by New York State and by the United States Attorney that they would not be prosecuted for the matters investigated by New York State. (Tr. 720). This followed the admonition that others' trials, if any, and punishment of Leon Greenberg, if any, simply were not appropriate for the jury's consideration. (Tr. 720). Indeed, that was so. Counsel's reading of the phrase "if the Court is required to impose any" as suggesting that there might not be *any* punishment is strained indeed. The phrase clearly means that punishment, in the event of conviction, should be of no concern to the jury. Had Judge Pollack used the word "conviction," undoubtedly the defendant would argue semantically that the trial court had forced a guilty verdict. The instruction as given surely had no such effect and was eminently fair and entirely correct.

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* The requested instruction was:

> "Bernard Roth and Paul Grossinger have been promised that they will not be prosecuted by United States Attorney although they could have been prosecuted in the federal jurisdiction.
>
> It makes no difference what Mr. Roth and Mr. Grossinger believe as to the extent of their immunity." (Court's Ex. 10).

POINT III

The defendant's motion to suppress was properly denied without a hearing.

Finally, Greenberg argues that Judge Pollack erred in denying, without a hearing, a defense motion to suppress evidence Greenberg claimed had been seized illegally from the Raceway corporation. This plaint is groundless, since, as Greenberg's motion papers made perfectly clear, he had no standing to move to suppress the evidence in question.

Prior to trial, the defendant filed a 112-page omnibus motion and brief seeking, among other relief, "A hearing to determine the admissibility of evidence unlawfully acquired and an order suppressing that evidence." (Appellant's Appendix at 14a). Judge Pollack denied the motion and did not require an evidentiary hearing.

The only facts offered in support of Greenberg's motion were contained in the affirmation of his counsel,* which alleged that corporate records of the Raceway had been seized in March, 1974 pursuant to subpoenas issued by the New York State Organized Crime Task Force. (Appellant's Appendix at 24a). The affirmation recited the history of state-court litigation on motions to quash

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* This Court has recognized that the affidavit of a defense counsel on information and belief is insufficient to obtain a hearing and that an affidavit reciting personal knowledge of the facts in question is required. *United States* v. *Gillette*, 383 F.2d 843, 848 (2d Cir. 1967). See *Cohen* v. *United States*, 378 F.2d 751, 760 (9th Cir. 1967). The defendant's pretrial motion here would have been properly denied on this ground as well, because counsel's affirmation is based upon his "investigation," interviews with unnamed persons, and his information and belief. (Appellant's Appendix at 16a, 17a, 24a).

the subpoenas, including the fact that a State Supreme Court Justice had granted such motions and ordered return of the records to the Raceway on July 31, 1974. Counsel then stated that the records had been impounded and sealed by consent of the parties pending appeal and that on May 25, 1975 the Appellate Division, Third Department, affirmed the lower court's quashing of the subpoenas and order return of the records. *Sussman v. New York State Organized Crime Task Force*, 48 A.D. 2d 154, 368 N.Y.S. 2d 588 (3d Dept. 1975). Counsel claimed that during this process the State authorities "turned over" the records which were in its custody to the United States Attorney's Office for the Southern District of New York, and that the records and evidence derived therefrom were subsequently presented to the Grand Jury which indicted the defendant.*

The ground for Greenberg's suppression motion was that evidence derived from the corporate records had been illegally seized by the State and then released on a "silver platter" to federal authorities. None of the defendant's moving papers, however, contained any suggestion that his personal records had been unlawfully seized in the fashion just described, or that he had any proprietary or possessory interest in the seized records. The motion thus established on its face that Greenberg had no standing to object to the seizure or admissibility

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* Counsel omitted several facts which he could not fairly dispute: namely, that the Federal Grand Jury subpoenaed the records from the State of New York as it had from the Raceway, after which the State applied, on notice to the corporation, to the Third Department Appellate Division, for an order to permit delivery of the records pursuant to the subpoena. The corporation entered no opposition, and the order was granted on December 3, 1974. The subpoenaed records were submitted to the Grand Jury, and ultimately some of the documents were admitted into evidence at trial. (GX 2A-2G, GX 3, GX 25).

of the corporate records and that no Fourth or Fifth Amendment right of his had been violated.*

Rule 41(e), Federal Rules of Criminal Procedure, provides that only a "person aggrieved" by an unlawful search and seizure may seek suppression and that the trial court "shall receive evidence on any issue of fact necessary to the decision of the motion." Thus, this Court held in *Grant* v. *United States*, 282 F.2d 165, 170 (2d Cir. 1960):

> "It follows that evidentiary hearings should not be set as a matter of course, but only when the petition alleges facts which if proved would require the grant of relief."

Accordingly, a hearing is *not* required under Rule 41(e) where the defendant's moving papers establish as a matter of law that he is entitled to no relief. See *Cohen* v. *United States*, 378 F.2d 741, 760 (9th Cir. 1967). For example, when the facts alleged by the defendant establish that the evidence sought to be suppressed was actually in plain view, and thus lawfully seized, no evidentiary hearing is required. *United States* v. *Purin*, 486 F.2d 1363, 1367 (2d Cir. 1973). Likewise, a factually vague affidavit will justify denial of such a motion without a hearing. *United States* v. *Culotta*, 413 F.2d 1343 (2d Cir. 1969), *cert. denied*, 396 U.S. 1019 (1970). See *United States* v. *Poe*, 462 F.2d 195, 197 (5th Cir. 1972); *United States* v. *Thornton*, 454 F.2d 957, 967

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* The defendant makes no specific claim that his right against self-incrimination under the Fifth Amendment was violated by the State's subpoena of the books and records of the coproration, and properly so. *United States* v. *White*, 322 U.S. 694 (1944); *Wheeler* v. *United States*, 221 U.S. 361 (1910). See *Bellis* v. *United States*, 417 U.S. 84 (1974); *Fuller* v. *United States*, 31 F.2d 747 (2d Cir. 1929). As is discussed *infra*, the same lack of standing prevails as to his Fourth Amendment claim.

n. 65 (D.C. Cir. 1971); *United States* v. *One 1965 Buick*, 392 F. 2d 672, 677 (6th Cir. 1968), *vacated on other grounds*, 402 U.S. 937 (1971).

In this case Judge Pollack's denial of the suppression motion without a hearing was proper because the moving papers showed as a matter of law that Greenberg lacked standing to object to the admission of the evidence against him. Greenberg's moving papers provided no support for a claim of a violation of his Fourth Amendment rights. At worst the State's action was a violation of the *corporation's* rights and Greenberg, although its president, was not entitled to object on that basis.*

In *Lagow* v. *United States*, 159 F.2d 245, 246 (2d Cir. 1946), *cert. denied*, 331 U.S. 858 (1947), this Court held that a corporate officer, even its sole shareholder:

> ". . . may not vicariously take on the privilege of the corporation under the Fourth Amendment; documents which he could have protected from seizure, if they had been his own, may be used against him, no matter how they were obtained from the corporation. Its wrongs are not his wrongs; its immunity is not his immunity."

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* We do not believe that there *was* in fact any violation of the corporation's constitutional rights. The state court proceeding determined only that the subpoenas issued by the New York State Organized Crime Task Force exceeded the authority granted to that body under state law. *Sussman* v. *New York State Organized Crime Task Force*, *supra*. That determination is not binding in federal court, *United States* v. *Culotta*, *supra*, nor is there any showing in Greenberg's motion papers that the corporation's federal constitutional rights were thereby violated. A claim of violation of a state procedural statute simply is insufficient to establish a viable assertion that Fourth Amendment rights have been abridged. See *United States* v. *Bedford*, 519 F.2d 650 (3d Cir. 1975); *United States* v. *Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970); *Cf. United States* v. *Burke*, 517 F.2d 377 (2d Cir. 1975).

This dichotomy between personal and corporate rights, had been repeatedly reorganized. See *United States* v. *H.J.K. Theatre Corp.*, 236 F.2d 502, 506 (2d Cir. 1956); *United States* v. *Britt*, 508 F.2d 1052 (5th Cir. 1972); *Hill* v. *United States*, 374 F.2d 871, 873 (9th Cir. 1967); *United States* v. *Goldberg*, 330 F.2d 30, 35 (3d Cir.), *cert. denied*, 377 U.S. 953 (1964).

Greenberg's counsel in effect makes the same argument here that he advanced unsuccessfully in *United States* v. *Fago*, 319 F.2d 791, 792 (2d Cir. 1963). There, this Court held that the individual defendant had "failed to show that the documents were his personal papers rather than records of the corporations, which he could himself have been compelled to produce." Here, of course, Greenberg's motion makes clear that he sought to suppress evidence derived from corporate, and not personal records.

Accordingly, Judge Pollack's denial of the motion without an evidentiary hearing was correct.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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T. BARRY KINGHAM,
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Assistant United States Attorneys,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

T. BARRY KINGHAM being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 30th day of March, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Gerald Price Fahringer, Esq.
One Niagara Square
Buffalo, New York 14202

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

T. Barry King

Sworn to before me this
30th day of March, 1976

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-[illegible]
Qualified in Kings County
Commission Expires March 30, 1977